

IN THE
MISSOURI SUPREME COURT

IN THE MATTER OF THE)	
CARE AND TREATMENT OF)	No. SC 86290
KENNETH SMITH,)	
Appellant.)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
SIXTEENTH JUDICIAL CIRCUIT, PROBATE DIVISION
THE HONORABLE JOHN BORRON, JUDGE

APPELLANT'S REPLY BRIEF

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JURISDICTIONAL STATEMENT

Mr. Smith appeals the judgment and order of the Honorable John Borron following a jury trial in Jackson County, Missouri, committing Mr. Smith to secure confinement in the custody of the Department of Mental Health as a sexually violent predator. This appeal was transferred to this Court from the Western District Court of Appeals prior to opinion because it raises a substantial question of the validity of a Missouri statute, Section 632.492, RSMo Cum. Supp. 2003, vesting jurisdiction in this Court. Missouri Constitution, Article V, Section 3.

STATEMENT OF FACTS

Mr. Smith incorporates the Statement of Facts set out in pages eight through thirty-one of his initial brief.

POINTS RELIED ON¹

II.

The probate court erred in denying Mr. Smith's motion to dismiss the State's petition because the requirement of Section 632.492, RSMo Cum. Sup. 2003, that the court instruct the jurors that if they found Mr. Smith to be a sexually violent predator he would be "committed to the custody of the director of the department of mental health for control, care and treatment" violated Mr. Smith's rights to due process of law and a fair trial before a fair jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 18(a) and 22(a) of the Missouri Constitution, in that the required instruction injects irrelevant matters into the juror's consideration and fails to fully advise the jurors of the consequences of their verdict and therefore it is an incorrect statement of the law misleading the jurors and minimizing their sense of responsibility in the consequences of their verdict.

¹ Mr. Smith will reply only to Point II of the State's brief, which combined Mr. Smith's Point I and Point II, and to Point III of the State's brief, which responded to Mr. Smith's Point IV. He will rely on the arguments previously raised in his initial brief on Point I.

In the Matter of the Care and Treatment of Coffell, 117 S.W.3d 116 (Mo.

App., E.D. 2003);

United States Constitution, Sixth and Fourteenth Amendments;

Missouri Constitution, Article I, Sections 10, 18(a), and 22(a); and

Section 632.492, RSMo Cum. Sup. 2003.

III.

The probate court erred in submitting over Mr. Smith's objection Instruction No. 6, instructing the jurors, "If you find Respondent to be a sexually violent predator, the Respondent shall be committed to the director of the department of mental health for control, care and treatment," because the instruction denied him his right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the sole responsibility of the jurors is to determine whether Mr. Smith is a sexually violent predator, not what occurs following such finding; which permitted the jurors to return a verdict which did not answer the proper, necessary, and ultimate question in the case, and informing the jurors that the purpose of the law is "treatment" minimizes the sense of responsibility for the jurors in determining whether Mr. Smith is a sexually violent predator.

In the Matter of the Care and Treatment of Coffell, 117 S.W.3d 116 (Mo.

App., E.D. 2003);

United States Constitution, Sixth and Fourteenth Amendments;

Missouri Constitution, Article I, Sections 10, 18(a), and 22(a); and

Section 632.492, RSMo Cum. Sup. 2003.

IV.

The probate court erred in submitting the verdict form offered by the State and in entering a judgment committing Mr. Smith to secure confinement in the Department of Mental Health as a sexually violent predator, in violation of his rights to due process of law and to a trial by a fair and impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 22(a) of the Missouri Constitution, in that the jury did not return a verdict finding the necessary elements required by Section 632.480(5), RSMo Cum. Supp. 2003; that Mr. Smith has been found guilty of a sexually violent offense, suffers a mental abnormality affecting his emotional or volitional capacity predisposing him to commit sexually violent offenses, and which makes him more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility.

State v. Stillman, 938 S.W.2d 287 (Mo. App., W.D. 1997);

State v. Baker, 103 S.W.3d 711 (Mo. banc 2003);

State v. Hawkins, 137 S.W.3d 549 (Mo. App., W.D. 2004);

United States Constitution, Sixth and Fourteenth Amendments;

Missouri Constitution, Article I, Sections 10, 18(a), and 22(a); and
Section 632.480(5), RSMo Cum. Supp. 2003.

ARGUMENT²

II.

The probate court erred in denying Mr. Smith's motion to dismiss the State's petition because the requirement of Section 632.492, RSMo Cum. Sup. 2003, that the court instruct the jurors that if they found Mr. Smith to be a sexually violent predator he would be "committed to the custody of the director of the department of mental health for control, care and treatment" violated Mr. Smith's rights to due process of law and a fair trial before a fair jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 18(a) and 22(a) of the Missouri Constitution, in that the required instruction injects irrelevant matters into the juror's consideration and fails to fully advise the jurors of the consequences of their verdict and therefore it is an incorrect statement of the law misleading the jurors and minimizing their sense of responsibility in the consequences of their verdict.

III.

² The State combined its responses to Mr. Smith's Point II and Point III in its brief, and Mr. Smith will reply in the same manner.

The probate court erred in submitting over Mr. Smith's objection Instruction No. 6, instructing the jurors, "If you find Respondent to be a sexually violent predator, the Respondent shall be committed to the director of the department of mental health for control, care and treatment," because the instruction denied him his right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the sole responsibility of the jurors is to determine whether Mr. Smith is a sexually violent predator, not what occurs following such finding; which permitted the jurors to return a verdict which did not answer the proper, necessary, and ultimate question in the case, and informing the jurors that the purpose of the law is "treatment" minimizes the sense of responsibility for the jurors in determining whether Mr. Smith is a sexually violent predator.

Mr. Smith adamantly disagrees with the State's assertion in its brief at page 23 that it is relevant to the juror's determination whether he is or is not a sexually violent predator that he will be committed for treatment if the jurors return a verdict finding that he is. A person is subject to involuntary commitment as a sexually violent predator only upon proof that he has a mental

abnormality predisposing him to acts of sexual violence, causing him serious difficulty controlling his behavior, and making it more likely than not that he will engage in predatory acts of sexual violence if not securely confined. *In the Matter of the Care and Treatment of Coffell*, 117 S.W.3d 116,121 (Mo. App., E.D. 2003). A lack of sexual offender treatment *in the past* is only an element by which experts and jurors attempt to determine a person's ability to control their behavior and the likelihood of re-offense. Dr. Birmingham used the lack of treatment in this case for exactly those reasons (Tr. 306-308, 309). That Mr. Smith will be treated in the custody of DMH *in the future* if found to be an SVP is totally irrelevant to his current ability to control his behavior and his current risk of re-offending, the real issues to be decided by the jurors. At least two cases pursued by the State under the SVP law have involved persons who had completed the Missouri Sexual Offender Program (MOSOP) while incarcerated, but went on to sexually re-offend. In those cases the State, and its experts, claimed that the treatment "didn't take," or that the person had not incorporated the benefits of treatment into his behavior.

As treatment is discussed at trial regarding the elements necessary for a determination whether a person is a sexually violent predator, it has nothing to do with the forcible treatment of the person *after* the jury's verdict. Future

treatment is irrelevant to the determination of whether the person is currently a sexually violent predator. The State's position allows, if not encourages, the jurors to render a verdict because the person will then be treated, and not necessarily because the State has shown difficulty controlling behavior and a risk that the person is more likely than not to re-offend. This reasonable and common sense conclusion is lost on the State. Not only is the State's position rejected by reason and common sense, it is also refuted by the very statutes under which the State involuntarily confines sexually violent predators. A person committed under the SVP law is not automatically released upon completion of the treatment offered after commitment. Section 632.501, RSMo 2000, sets out the procedure for release when the director of DMH approves of the release: "If the director of the department of mental health determines that the person's mental abnormality has so changed that the person is not likely to commit acts of sexual violence if released, the director shall authorize the person to petition the court for release." The statutory standard is *not* that the person has completed the DMH treatment; it is that the mental abnormality has so changed that the person can control his behavior and is not more likely than not to re-offend. As with the situation at trial, treatment is only an element to be considered in determining these issues. Nor is the attorney general bound by the

determination of the director of the Missouri Department of Mental Health.

“The attorney general shall represent the state, and shall have the right to have the petitioner examined by a consenting psychiatrist or psychologist not employed by the department of mental health or department of corrections.”

Section 632.501. Even if the treatment providers of the Missouri Sexual Offender Treatment Center (MSOTC) report that the person has completed treatment and is ready for release, the attorney general can hire a paid expert to nonetheless maintain that the person still has serious difficulty controlling his behavior and is still more likely than not to re-offend if released. Mr. Smith challenges the State to concede in this appeal that completion of the MSOTC treatment program will necessarily result in his release.

Future treatment is irrelevant to the pending question of current difficulty controlling behavior and risk of re-offense. The required instruction also misleads the jurors. It causes them to assume that completion of treatment is the key to the locked door. It is not. But the State insists in pursuing this misleading impression by rejecting Mr. Smith’s offered instruction that set out, in full, the consequences of the commitment, and that completion of treatment would not necessarily result in his release. Mr. Smith’s instruction informed the jurors:

If you find respondent to be a sexually violent predator, he shall be committed to the custody of the director of the department of mental health for control, care and treatment. There is no maximum period of such commitment. Respondent shall remain so committed until a later, separate jury unanimously determines that his mental abnormality has so changed that he is safe to be at large and will not engage in acts of sexual violence if released.

(Tr. 409-410, L.F. 200). While this is a full and complete statement of the consequences of the jury's verdict, the State argues that "Section 632.492 is the law," and therefore Mr. Smith's instruction is not permitted (State's Br. 31). The State's argument is an admission that Section 632.492 requires an instruction which misleads the jurors regarding the consequences of their verdict.

The State argues that the instruction "imparts relevant information to the jury" because as the probate court noted, "all through voir dire the jury wanted to know what was going to happen to him if he gets committed, and talk about confusion-" (Tr. 409-410) (State's Brief 24). The State claims that, "Instruction No. 6 not only imparts relevant information, but clarifies an issue for the jury." (State's Br. 24). This is a remarkable argument because injecting the information required by the statute was the cause of the confusion. The first time the State

sought to bring up the issue of treatment the probate court advised the State that neither it, nor Mr. Smith, was going to be allowed to argue that issue (Tr. 19).

When the State was discussing its burden of proof it asked the venire panel, “Does anybody have a problem with that, feel like they could not commit a person for care, control and treatment unless I could prove beyond a reasonable doubt he will, in fact, do it without a doubt?” (Tr. 22). The question got no response (Tr. 22). The State then asked, “[o]n the flip side,” if the jurors were not convinced beyond a reasonable doubt, “is there anybody here that would not follow the court’s instruction and not have him committed....” (Tr. 23). A venire member asked if commitment was the only option (Tr. 23). The State answered, “Yes. I believe the court will instruct you that if you find him to be a sexually-violent predator that the court, the court will commit him for care, control and treatment, and that is the only decision you can make in this case.” (Tr. 23-24).

The venire person was not sure he could follow such an instruction (Tr. 24). The State later told the venire panel, “this is not a criminal case, and if you find in favor of the petitioner in this case you won’t send Mr. Smith to prison, he will be committed to a secure facility at the Department of Mental Health for care, control and treatment.” (Tr. 41-42). The State asked if any of the venire members thought that because Mr. Smith had done his time in prison for the criminal

offense that he should not be committed to a mental health facility (Tr. 42). Three venire members thought it was not a mental issue and repeat sex offenders should be put away and never let out (Tr. 42-47). The State asked if any of the venire panel had a bias for or against mental health facilities (Tr. 51). Three venire members did (Tr. 51-55). The State then told the venire members, "I don't expect you will hear any answer to if he is committed what type of treatment and how long and those sorts of things, but you will be told that if you find him to be a sexually violent predator he will be committed for care, control and treatment," and asked if that influenced their ability to hear the case (Tr. 55-56). At least ten venire members discussed their good or bad impressions of treatment friends or family have received in mental health facilities, and expressed concerns over the type of treatment that would be provided (Tr. 56-65). The State repeatedly told the venire panel that there were questions they would not get answers to, such as the type and length of treatment, but that Mr. Smith would be committed for treatment (Tr. 56-65). The State ended this colloquy by reminding the jurors; "Your decision will be does he meet the definition of a sexually-violent predator under Missouri law, and if he does, then he will be committed for care, control and treatment." (Tr. 66).

As the State is very much aware, the only question is whether Mr. Smith is or is not a sexually violent predator. What the court does after they reach a verdict is not an issue for their consideration. But the statute injects that issue into the case. The confusion that followed was due to the fact that the jurors were told that Mr. Smith would be committed for treatment, but there was a lot of information about that treatment that would not be provided. But the State claims that the instruction, which says only that Mr. Smith will be committed for control, care and treatment, is relevant to resolve the confusion caused by telling the jurors only that Mr. Smith would be committed for control, care and treatment without any further explanation. This argument is nonsensical.

As the State told the venire panel, there are many questions about treatment that it will not answer for them. But it insists on injecting the issue of treatment, in its confusing form, into the case. Why? Because contrary to the State's argument, it aids the State in winning a judgment by minimizing the jurors sense of responsibility in the case, and changing the focus from indefinite secure confinement to treatment. Mr. Smith will not repeat the arguments from his initial brief here, but will offer an example of this effect. Parents take children to doctors or dentists everyday, kicking and screaming because they don't want to go to the doctor or dentist. But the parents take them anyway because it is

good for the child. The State is invoking the same sense of responsibility in the jurors. They sit through trial and hear a lot of “kicking and screaming,” in the form of examination and cross-examination of witnesses and closing arguments, over whether the person has serious difficulty controlling behavior and the likelihood of re-offense. But then the State argues that the person “needs” treatment. It asks the jurors to ignore the kicking and screaming, and drag the person into treatment because that’s what is best for him. This can be the only reason the State insists on injecting a confusing and unexplained issue into the case.

Section 632.492 requires the probate court to submit to the jurors an instruction injecting irrelevant matters into their consideration, misleading them as to the full consequences of their verdict imposed by the substantive law, and which has a substantial probability of minimizing their sense of responsibility in their verdict. The statutorily required instruction violates Mr. Smith’s constitutional rights to due process of law and a fair trial before a fair jury. Section 632.492 is unconstitutional and the probate court erred in denying Mr. Smith’s motion to dismiss the petition filed against him. The judgment of the probate court must be reversed and Mr. Smith must be discharged. In the

alternative, the judgment should be reversed and the cause remanded for anew trial without the instruction required by Section 632.492.

IV.

The probate court erred in submitting the verdict form offered by the State and in entering a judgment committing Mr. Smith to secure confinement in the Department of Mental Health as a sexually violent predator, in violation of his rights to due process of law and to a trial by a fair and impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 22(a) of the Missouri Constitution, in that the jury did not return a verdict finding the necessary elements required by Section 632.480(5), RSMo Cum. Supp. 2003; that Mr. Smith has been found guilty of a sexually violent offense, suffers a mental abnormality affecting his emotional or volitional capacity predisposing him to commit sexually violent offenses, and which makes him more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility.

The State begins its response to this Point by trying to secure a higher standard of review by suggesting that this challenge is unpreserved (State's Br. 32-35). Mr. Smith preserved this issue for appeal.

Mr. Smith offered to the probate court during the instruction conference a verdict form as an alternative to the one offered by the State (Tr. 410). The conference involved

the offer by Mr. Smith of all his alternative forms in what appears to have been an opportunity to make a record on the refusal of the forms by the court (Tr. 401-411). During the conference the court inquired of Mr. Smith the appropriate numbers or letters to be placed in the blank of his verdict form identifying the verdict director (Tr. 410-411). At the end of the conference the court stated, “The court gives Instructions two through seven inclusive together with State’s proper form of verdict. Respondent’s Instructions A through I and form of verdict are refused.” (Tr. 411).

This conference occurred at the end of a day’s testimony, and before the beginning of Mr. Smith’s case (Tr. 400, 401, 424). At the close of the evidence, the probate court read Instructions two through seven to the jurors (Tr. 583). It was at this point that Mr. Smith approached the court and said, “Judge, I’m sorry but I believe I failed to object to the verdict form, even though I submitted my own....” (Tr. 584). Mr. Smith told the court, “at this time I would object to the verdict form because I believe it is having the jury make a finding not required by the statute; in fact, it’s not having the jury make a finding that is required by the statute, so that’s my objection.” (Tr. 584). Mr. Smith again asked the court to submit his instruction (Tr. 585). The court overruled Mr. Smith’s objection and the case proceeded to closing arguments (Tr. 585).

The State argues that this issue raised on appeal is not preserved because it was not timely made, having been made after the instruction conference without specifying what was missing from the verdict form until the motion for new trial (State’s Br. 32-34). As the State notes, Mr. Smith “claimed at trial that the verdict director included what Smith believed was an unnecessary element and failed to include what he believed was a

necessary element....” (State’s Br. 33). The probate court had both verdict forms available to it during the instruction conference. The question for the jurors in an SVP trial is “whether ... the person is a sexually violent predator.” Section 632.495, RSMo Cum. Sup. 2003. The unnecessary element in the State’s form was a finding by the jury that Mr. Smith should or should not be committed to the Department of Mental Health for control, care and treatment as a sexually violent predator (L.F. 201). That is what the court orders after the jurors find that a person is a sexually violent predator. See, State’s Brief, Point II. The necessary element, “the finding that is required by the statute,” not asked in the State’s form is a finding by the jurors that Mr. Smith is or is not a sexually violent predator. This is the question presented in the verdict form Mr. Smith offered to the court (Sup.L.F. 1). The State argues that the basis of Mr. Smith’s objection at trial was not the same as the objection he made in the motion for new trial, that the verdict form “requires a finding not in the statute and ... fails to require the jury to actually find respondent is a sexually violent predator.” (L.F. 218). (State’s Br. 33). Only by the most hypertechnical interpretation of the rules can Mr. Smith’s objection that the verdict did not call for a “finding that is required by a statute,” “whether ... the person is a sexually violent predator,” not be the same as his objection that the verdict “fails to require the jury to actually find respondent is a sexually violent predator.” The Western District Court of Appeals noted in *State v. Stillman*, 938 S.W.2d 287 (Mo. App., W.D. 1997), that absolute application of general rules on appeal can be a hypertechnical course unwarranted by the obvious intentions and understandings of the parties in the proceeding below. The defendant moved to suppress evidence, and renewed that objection during

testimony, but said “no objection” when the evidence was offered at trial. *Id.* at 289-290). While the general rule would consider the “no objection” as a waiver of the claim rendering it unpreserved for appeal, the Court recognized the understanding of the parties that defense counsel was not waiving his objections to the evidence. *Id.* at 290.

According to the Court: “To now rule a waiver of this point and a denial of review would be a hypertechnical application of the requirement of renewing the objection at every stage.” *Id.* This recognition of the understanding of the parties below and rejection of hypertechnical application of procedural rules is followed in other cases. In *State v. Baker*, 103 S.W.3d 711, 716-717 (Mo. banc 2003), this Court rejected hypertechnical application of the procedural rule by recognizing the intention of the objecting party: “In effect, appellant was stating that he had no objection other than the continuing objection.” And in *State v. Hawkins*, 137 S.W.3d 549, 556 (Mo. App., W.D. 2004), the Court engaged in similar interpretation of the intention below: “The prosecutor and the trial court below could have reasonably interpreted defense counsel’s statement of ‘no objection’ to mean that he had no objection to the State introducing its exhibits at that time, rather than having to re-open its case to do so.” In Mr. Smith’s case, the issue of the competing verdict forms had been presented to the same court by the same attorney in a prior case: “We had that the last time and I think that’s the one that got submitted.” (Tr. 584). It is reasonable to conclude that the probate court below was fully aware of the nature of Mr. Smith’s objection before closing arguments and submission of the case, with the contested verdict form, to the jury. This issue has been preserved for appeal.

CONCLUSION

Because the evidence was insufficient to support Mr. Smith's confinement as a sexually violent predator, and because the probate court erred in not dismissing the petition in that Section 632.492 injects irrelevant and prejudicial matters into the minds of the jurors, the judgment of the probate court must be reversed and Mr. Smith must be released. Because the probate court erred in submitting Instruction No. 6 to the jurors, and erred in submitting the State's verdict form, the judgment of the probate court must be reversed and the cause remanded for a new trial.

Respectfully submitted,

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Certificate of Compliance and Service

I, Emmett D. Queener, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Book Antiqua size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 4,569 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in October, 2004. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 10th day of November, 2004, to Victorine R. Mahon, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65101.

Emmett D. Queener

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